

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 19, 2008 Session

STATE OF TENNESSEE v. LISA E. BURRIS

Appeal from the Circuit Court for Rutherford County
No. 59293 James K. Clayton, Jr., Judge

No. M2007-02576-CCA-R3-CD - Filed October 6, 2008

The defendant, Lisa E. Burris, appeals the Rutherford County Circuit Court's denial of her bid for judicial diversion. Because the record does not show that the trial court considered the full array of factors upon which its decision should be based and because the record supports an award of judicial diversion in this case, we vacate the judgments and remand the case for the imposition of judicial diversion subject to her qualifying pursuant to Tennessee Code Annotated section 40-35-313(a)(3).

Tenn. R. App. P. 3; Judgments of the Circuit Court Vacated and case Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. McMULLEN, J., joined.

Lee E. Dryer and Gene Honea, Franklin, Tennessee, for the appellant, Lisa E. Burris.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pleaded guilty to one count of promoting prostitution, a Class E felony, *see* T.C.A. § 39-13-515 (2006), and one count of patronizing prostitution, a Class B misdemeanor, *see id.* § 39-13-514(a), (b)(1), and requested judicial diversion, *see id.* § 40-35-313. The trial court held a hearing on the diversion request on August 13, 2007. On October 1, 2007, the trial court denied diversion and entered the judgments, imposing concurrent, suspended sentences of two years for the conviction of promoting prostitution and six months for the conviction of patronizing prostitution.

In the August 13, 2007 hearing, the defendant testified that she was born in Clarksville and held a four-year degree from Middle Tennessee State University. At the time of the hearing, she was in the process of obtaining a divorce from her husband, with whom she had three

children. The defendant testified that their marriage was amicable until their first daughter was diagnosed with cancer. At that point, she had to stop working and her “husband made it very clear that . . . because [she] did not bring home a paycheck, [she] lost all rights, decisions or financial input or anything to do with decisions in [their] marriage.”

The defendant testified that she first filed for divorce in August 2003, but the couple reconciled in 2005. After the reconciliation, her husband continued to deny her access to the checking account. Her initial attempts to find employment after 13 years of taking care of the children were unsuccessful. She testified that as a result of not having access to the family finances, essential family needs such as her prescribed medication and trips to the doctor for their children were not met.

The defendant testified she got involved in the case when she “was approached online by a man who offered to pay for services.” She needed money to re-initiate divorce proceedings, “a large amount that [she] didn’t have,” and she felt uncomfortable asking her family for money because they had been so upset when she reconciled with her husband.

The defendant testified that she knew her actions were morally wrong but that she was “desperate.” Since her arrest, she had become active in her church spiritual group and a divorce counseling group and was employed as a senior project manager.

On cross-examination, the defendant admitted that she used the computer to set up her appointments to have sex for money with several individuals over a four-month period. She operated an internet website named “HoneyGFE”; the initials GFE stood for “girl friend experience.” She testified that she used the website to obtain information from potential clients in order to ensure that no potential client was a police officer. She admitted that she had suffered from depression during the period she was a prostitute but noted that in the months following her arrest the depression had ceased.

Kimberly Tate, who knew the defendant through the church spiritual journey group, testified that when she first met the defendant, the defendant was depressed, suicidal, and spoke of suffering abuse from her husband. She testified that after the defendant was arrested and began coming to group sessions, “her state of mind [became] much healthier.”

Jimmy Burris, the defendant’s ex-husband, testified that the defendant stopped working when their first child was diagnosed with cancer. He recalled that although she briefly returned to the work force, she never went back to full-time work after their second child was born. Mr. Burris denied refusing money to the defendant for essential family needs and claimed that the defendant had a debit card and access to the family check book. He also denied preventing the defendant from buying her cholesterol medicine but admitted he could not afford it every time. He testified that he removed her name from the checking account only after their first divorce proceeding began.

Mr. Burris testified that although the original divorce proceeding was initiated by the defendant, he had discovered several months before that proceeding that she was having “cybersex” with other men online. Although the couple later reconciled, the reconciliation lasted “only a week or two . . . she was still on the computer with men, and [he] said that we can’t have that.” He had installed monitoring software on the computer that tracked which websites were accessed. The couple remained together in the same house after separating. Mr. Burris testified that he thought the defendant was obtaining money through employment with a greeting card company.

On cross examination, Mr. Burris admitted that he reported the defendant’s online activities to the police department. He denied ever seeing anything that indicated she was depressed. He testified that he wanted the defendant’s request for diversion denied because “she was doing illegal acts around [the] children.” He testified that photographs of the defendant that appeared on her website were taken in the family home.

Erin Stephens, who prepared the presentence report, testified that the defendant told her that she was in good mental health and that her physical health was fine except for high blood pressure and high cholesterol. The defendant did not mention any instances of depression in the interview.

On October 1, 2007, the trial court reached its decision, ruling:

I have no question in my mind that [the defendant] is entitled to a suspended sentence in this case, because I think she has done a good job of accepting responsibility and doing something about it. And apparently she is now employed. She’s now a lot better off than she was for that four[-]month period of time.

But I do still have to consider that it was a four[-]month period of time. It was advertised on the internet. And certainly she went to a great extent to carry on the profession that she was taking part in at the time.

I feel like the [c]ourt has a right under the law, as I understand it, to deny a 40-35-313 diversion in a case where there has been an extensive intent to violate the law as there was in this case.

The defendant appeals from the denial of diversion, alleging that the trial court abused its discretion in denying diversion solely on the basis of the “sustained intent” to violate the law.

“Judicial diversion” is a reference to the provision in Tennessee Code Annotated section 40-35-313(a) for a trial court’s deferring proceedings in a criminal case. *See* T.C.A. § 40-35-313(a)(1)(A) (2006). Pursuant to such a deferral, the trial court places the defendant on probation “without entering a judgment of guilty.” *Id.* To be eligible or “qualified” for judicial diversion, the

defendant must plead guilty to, or be found guilty of, an offense that is not “a sexual offense or a Class A or Class B felony,” and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id.* § 40-35-313(a)(1)(B)(i)(b), (c). Diversion requires the consent of the qualified defendant. *Id.* § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). The statute states that a trial court may grant judicial diversion in appropriate cases. *See* T.C.A. § 40-35-313(a)(1)(A) (2006) (court “may defer further proceedings”). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

“Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion.” *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

[T]he defendant’s criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Id. at 343-44; *see State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the trial court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The trial court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id.*

On appeal, this court must determine whether the trial court abused its discretion in failing to grant judicial diversion. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168. Accordingly, when a defendant challenges the denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court’s decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

First, we point out that the defendant pleaded guilty to a Class E felony and Class B misdemeanor and has no prior criminal record. Therefore, she qualifies to be considered for judicial diversion. Second, the record in this case shows that the trial court’s only consideration in denying judicial diversion was that the defendant’s actions showed a “sustained intent” to violate the law

because she “made a mistake over and over again.” The trial court failed to consider the other relevant factors enumerated in *Cutshaw* and offered no explanation of either why it used a truncated analysis or why the “sustained intent” factor outweighed the others. *Bonestel*, 871 S.W.2d at 168. Therefore, we will conduct a de novo review of the entirety of the evidence to “determine whether the trial court reached the correct result, notwithstanding its failure to explain its reasoning.” *State v. Jared Singleton*, No. M2002-02392-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Nashville, Mar. 5, 2004).

Several factors support the defendant’s request for diversion. As for the defendant’s amenability to correction, we note that the trial court itself stated that the defendant “has done a good job of accepting responsibility” since her arrest. The defendant has no prior criminal record and she testified that she had been employed since January 2007. The record shows that the defendant took steps after her arrest to improve her mental and physical condition. Facts relating to the defendant’s social history support her receiving diversion, including her support by her family and friends in the community. Further, we think diversion would be a sufficient deterrent for the defendant in light of her fully understanding and accepting the consequences of her actions.

The trial court found that the defendant’s sustained intent to violate the law supported the denial of diversion. Although we agree that this is a circumstance of the offense, in light of the number of factors supporting the granting of diversion, we conclude that diversion is proper in this instance and will serve the ends of justice and the best interests of the public and the defendant. In particular, we believe that the defendant is amenable to rehabilitation. *See State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999) (stating that in deciding whether to grant pretrial diversion, focus should be on defendant’s amenability to correction).

Accordingly, we hold that the trial court erred in denying diversion. In consequence, we vacate the judgments and remand the case for an order placing the defendant on diversion, provided a certificate is obtained from the Tennessee Bureau of Investigation reflecting that the defendant is not disqualified from diversion. *See* T.C.A. § 40-35-313(a)(3) (“No order deferring further proceedings and placing the defendant on probation as authorized by this subsection (a) may be entered by the court on or after July 1, 1998, unless there is attached to it a certificate from the Tennessee bureau of investigation stating that the defendant does not have a prior felony or Class A misdemeanor conviction.”).

JAMES CURWOOD WITT, JR., JUDGE